No. 80-346

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MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH OF VIRGINIA AND
COLONEL DENNY M. SLANE, SUPERINTENDENT
VIRGINIA STATE POLICE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, having in an unchallenged ruling reversed the district court's refusal to hear the United States' claims under Title VII and remanded the case for reconsideration under that statute, erred in directing the district court to reconsider its rulings (1) on civilian hiring in light of an intervening court of appeals decision as to the burdens of proof under Title VII with respect to applicant qualifications; (2) on background investigations of trooper applicants in light of applicable Title VII guidelines; and (3) on test validation in light of the same guidelines.

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The opinion of the court of appeals (Pet. App. A) is reported at 620 F.2d 1018. The opinion of the district court on liability (Pet. App. B) is reported at 454 F. Supp. 1077. The opinion of the district court on relief (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1980, and a petition for rehearing was denied on June 3, 1980 (Pet. App. A). The petition for a writ of certiorari was filed on September 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves alleged discriminatory employment practices of the Virginia State Police (VSP).[1] Before 1969, no blacks and no women had ever been employed by the VSP as state troopers. Between 1969 and 1972, only four blacks were hired as state troopers, and only 3.3% of the new troopers hired between 1972 and 1976 were black. No woman was offered a position as a state trooper prior to 1976 (Pet. App. B13). In 1975, only 11 of the VSP's 1104 troopers were black, and all of the troopers were male. In civilian positions with the VSP, blacks were relegated to the lower-paying and less desirable positions, and no black applicants were selected for

[1] This statement of the case, unless otherwise indicated, has been taken from the district court's liability opinion of July 24, 1978 (Pet. App. B3-B5) and the court of appeals' opinion of April 17, 1980 (Pet. App. A3-A6).

any of the VSP's 85 dispatcher positions prior to 1977.

On December 23, 1976, the United States brought this suit against petitioners, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), and of Section 518(c)(1) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3766(c)(1) (the Crime Control Act). The complaint alleged that petitioners had engaged in a pattern and practice of discrimination against black applicants for civilian positions with the VSP, and against both black and female applicants for positions as state troopers.

The district court dismissed the United States' claims under Title VII, on the ground that the suit was instituted by the Attorney General rather than by the Equal Employment Opportunity Commission (EEOC), as required by 42 U.S.C. 2000e-6(e). *United States* v. *Commonwealth of Virginia*, No. 76-0623-R (E.D. Va. Apr. 7, 1977). The case proceeded to trial on the merits of the United States' claims under the Crime Control Act.

The district court in its opinion and order on the liability aspect of the Crime Control Act claims (Pet. App. B) found that, prior to July 1, 1973, the effective date of the antidiscrimination provisions of the Act, Virginia had discriminated against black applicants for civilian positions and against both black and female applicants for trooper positions (*id.* at B4), and that, after the effective date of the Act, it continued to discriminate against female applicants for trooper positions by use of height and weight requirements (*id.* at B19)[2] and against black appli-

[2] The court also found that the VSP failed actively to recruit female applicants after the effective date of the Act (*id.* at B17).

cants for the civilian position of dispatcher by use of an unvalidated written test (*id.* at B29). However, the court found that the Commonwealth had not discriminated against black applicants for trooper positions or for the remaining civilian positions after the effective date of the Act. More specifically, the court found, *inter alia*, that: (1) there was no evidence in the record as to which of VSP's civilian positions require skills that are commonly held or easily learned, which positions require more specialized skills, and how many blacks in the available labor force possess those specialized skills, and there was therefore no basis for determining that blacks are so underrepresented in civilian positions with the VSP that racial discrimination can be inferred (Pet. App. B23); (2) background investigations of applicants for trooper positions revealed neither a pattern and practice of racial discrimination nor any instance of racial discrimination against any individual applicant, since in each instance the Commonwealth articulated a legitimate, nondiscriminatory reason for the applicant's rejection and those reasons were not shown to be pretexts masking racial discrimination (*id.* at B71);[3] and (3) a written examination required for applicants for trooper positions had a disparate impact on black applicants, but the test had been properly validated against training school performance and its use therefore was not an unlawful employment practice (*id.* at B41, B45).

In its opinion and order on remedies (Pet. App. C), the district court enjoined the Commonwealth from discriminating against black applicants for posi-

[3] The court also rejected the United States' claim that the use of background investigations as a selection device had a disparate impact on black applicants (*id.* at B50).

tions as dispatchers and female applicants for positions as troopers; ordered additional recruitment efforts to compensate for past discrimination in these areas, and directed the submission of quarterly reports to the court outlining such recruitment efforts; and required the Commonwealth to identify and make whole the victims of its past discrimination. The court, however, rejected the United States' request that the remedial order contain numerical goals and timetables for the hiring of women as troopers and blacks as dispatchers.

The United States appealed and the Commonwealth cross-appealed from both district court orders. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded the case to the district court (Pet. App. A).

In rulings not challenged here, the court of appeals affirmed the district court's use of the Title VII impact standard in evaluating the United States' claims under the Crime Control Act (Pet. App. A7); affirmed the district court's holdings that the VSP discriminated against women by use of height and weight requirements (*id.* at A11) and against blacks by use of an unvalidated written test (*id.* at A10); and reversed the district court's dismissal of the United States' claims under Title VII, directing the district court on remand to consider, *inter alia*, petitioners' liability for discrimination between March 24, 1972, the effective date of Title VII, and July 1, 1973, the effective date of the Crime Control Act (*id.* at A7, A14).

The court of appeals also vacated those portions of the district court's order finding no violation of the Crime Control Act. The district court was directed on remand to:

(1) address each civilian job classification to determine which positions, if any, require specialized skills, and, based on this determination, permit further development of the statistical data bearing on alleged discrimination against black applicants for such positions under the standards set forth in *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979) (Pet. App. A13, A14);

(2) reconsider the use of background investigations of applicants for trooper positions in light of the applicable EEOC guidelines (*id.* at A11-A12); and

(3) reconsider the validity of the written examination for trooper positions in light of the applicable EEOC guidelines (*id.* at A11).

The court of appeals expressly declined to discuss the remedies ordered by the district court (*id.* at A14). The court indicated that its views as to the proper relief would depend on the district court's findings on remand, and it reserved judgment on this issue until such findings had been made. Cf. *Hazelwood School District* v. *United States*, 433 U.S. 299, 312-313 (1977).

ARGUMENT

Petitioners seek review of an interlocutory order of the court of appeals remanding the case for further proceedings in which the district court may consider certain claims of the United States in light of Title VII, judicial interpretations of that statute, and applicable EEOC guidelines that the district court did not initially consider. Petitioners do not question the necessity of a remand, for they do not challenge the holding that the district court erred in dismissing the Title VII claims of the United States.

Rather they challenge the propriety of the directions on remand with respect to the claims relating to statistical disparities in the VSP's hiring for civilian positions and to the VSP's use of background investigations and of a written examination for trooper positions.

There is no reason for this Court to depart from its usual practice of declining to review nonfinal orders of courts of appeals. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893). If the proceedings on remand do not result in findings adverse to petitioners, petitioners will have no need to seek appellate review of the issues they are here raising. Review is, in any event, unwarranted because, as we show below, the directions for the treatment of claims on remand are based on a correct understanding of the law and do not conflict with decisions of this Court or of other courts of appeals.

1. Petitioners challenge (Pet. 16-21) the court of appeals' remand of the claim respecting statistical disparities in hiring for civilian positions, contending that the court of appeals found no error in the district court's analysis of that evidence and that therefore it was improper to permit the United States on remand to submit additional statistical data bearing on civilian hiring.

This claim is without merit. The court of appeals implicitly and correctly found that this issue had not been adequately developed or analyzed because the district court and the litigants had not had the benefit of the court of appeals' recent decision in *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178 (4th

Cir. 1979). *Radiator Specialty* sets out an analytical framework, based on this Court's decisions in *Hazelwood School District* v. *United States*, 433 U.S 299 (1977), and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), for determining when the use of specially qualified labor pool statistics, as opposed to general population statistics, is required to establish the existence of racial disparities in hiring, and it also specifies the allocation of the burden of proof in differing circumstances.

Hazelwood holds (433 U.S. at 308 n.13) that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." In *Radiator Specialty*, the Fourth Circuit explained (610 F.2d at 185) that, where the need for specially qualified workers is not "manifest as a matter of law" from the titles of the jobs at issue,

> *the burden should be upon defendant to establish that the positions in fact do require special qualifications not possessed or readily acquired by the general population, at peril of having the general population statistics presumed appropriate* in assessing plaintiff's *prima facie* proof. If the defendant succeeds in this the plaintiff should have an opportunity to adjust his statistical proof to reflect a labor pool base with the special qualifications found required. [Footnote omitted; emphasis added.]

The remand here was needed because, contrary to petitioners' assertion (Pet. 18 n. 2) that the district court's analysis of the United States' statistics "fol-

lows precisely the Court of Appeals' views in *Radiator Specialty*," the district court's allocation of the burden of proof as to some of the civilian jobs was clearly at odds with the *Radiator Specialty* standard. The court recognized (Pet. App. B23, B26) that its determination of which jobs required only skills that are possessed by many persons or are readily acquired was based on a purely speculative assessment of the meaning of the various job titles. It should therefore have held that unless petitioners carried their burden of proving that particular jobs required special skills, the general population data offered by the United States would be accepted as a proper basis for comparison. Instead, the court (*id.* at B23) assigned the United States the burden of proving "that the skills are commonly held and easily learned" in order to establish the relevance of general population statistical data.

Petitioner does not challenge the correctness of the burden of proof standard in *Radiator Specialty*, which, we note, is consistent with statements of this Court in *Dothard* v. *Rawlinson*, 433 U.S. 321, 330-331 (1977). It was therefore entirely proper for the court of appeals to remand so that the district court may make proper threshold findings and permit further development of the record in accordance with those findings.

2. In remanding the United States' claim regarding background investigations of applicants for trooper positions, the court of appeals indicated (Pet. App. A11-A12) that the district court "should consider in the light of [the EEOC] guidelines the charge that the background investigation used by the Commonwealth served as a pretext for eliminating black applicants or whether there was 'some legitimate,

nondiscriminatory reason for the employee's rejection.' *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). *See EEOC* v. *United Virginia Bank/Seaboard National*, [615 F.2d 147 (4th Cir. 1980)]." Petitioners contend (Pet. 23-24) that this remand was improper, because no error was found by the court of appeals in the district court's initial consideration of that claim, and because the EEOC guidelines "have no direct application to cases of alleged intentional discrimination involving disparate treatment."

The first contention is erroneous because the court of appeals implicitly found error in the district court's failure to evaluate the claims relating to allegedly discriminatory background investigations in the light of EEOC guidelines.[4]

The second contention is similarly without merit. It is true that the terms used in the court of appeals' remand on this point ("pretext," "legitimate nondiscriminatory reason") are suggestive of disparate treatment as distinguished from disparate impact (see *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977)), whereas both the EEOC Guidelines and the Uniform Guidelines relate primarily to analyses of disparate impact. But the United States challenged the VSP's use of background investigations on both theories (see Pet. App. B47, B52). While the focus on appeal

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[4] These guidelines include both the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 (1976) (Pet. App. F) (EEOC Guidelines), and the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295 *et seq.* (1978) (Uniform Guidelines), which were adopted by the EEOC, the Civil Service Commission, the Department of Labor and the Department of Justice (see *id.* at 38296).

was on the investigations' disparate impact on black applicants, and this claim is most appropriate for reconsideration under the guidelines on remand, there is no reason why the district court on remand should not consider the evidence pertinent to the disparate treatment theory as well.[5] In any event, the proper interpretation of the remand order is best left to the district court; and however the district court chooses to interpret its obligation on remand, it is of course not foreclosed from again concluding that the VSP's background investigations are valid.

3. The district court found that the VSP's use of a written test for applicants for trooper positions had a "severe adverse impact" on black applicants (Pet. App. B41, B39; see also Table VII, *id.* at B42). The court determined, however, that petitioners had met their burden of establishing the validity of the test by demonstrating that it was a valid predictor of training school performance (*id.* at B47), and that the VSP's use of the test therefore was not an unlawful employment practice (*id.* at B45).

The court of appeals vacated this determination because the district court "declined to apply the EEOC guidelines applicable to the possible discriminatory nature of the written examinations" (Pet. App. A5-A6 (footnote omitted)). The court pointed out that these guidelines constitute the administrative inter-

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[5] For example, the district court on remand might reconsider its disparate treatment findings in light of the EEOC guidelines on disparate treatment (see 29 C.F.R. 1607.11) and it might reconsider its conclusion that the VSP's use of " 'standardless discretion' " in evaluating job applicants' backgrounds is justified regardless of impact in light of Section 6B(1) of the Uniform Guidelines, 43 Fed. Reg. 38299 (1978), which concerns elimination of the adverse impact of informal or unscored selection procedures.

pretation of Title VII by the enforcing agency (*id.* at A6 n.6), and, as such, are entitled to great deference. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 430-431 (1975). Although the district court acknowledged this principle in its opinion (Pet. App. B45), its entire analysis of the Commonwealth's written test under the applicable guidelines consisted of a statement (*ibid.*) that "the validity of a test does not rise or fall solely on the basis of whether the test and the validity study concerning that test meet the Guidelines." A remand for adequate consideration of the guidelines in assessing the United States' claim regarding the VSP's written examination (Pet. App. A11) was therefore entirely appropriate.[6]

There is no merit to petitioners' contention (Pet. 10-16) that the terms of the remand should be reviewed by this Court in order to resolve a dispute between petitioners and the United States over the bearing of *Washington* v. *Davis*, 426 U.S. 229 (1976), on the district court's reconsideration of the United States' claims concerning the validity of the written examination and in order to "eliminate confusion which now exists in the federal courts concerning the proper application of *Washington* v. *Davis* and the principles of training school validation in Title VII actions" (Pet. 10). First, it is possible that findings made by the district court on remand would satisfy *Washington* v. *Davis* standards as construed by either party, thus obviating the need to resolve the dispute between them.

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[6] Thus, for example, the district court on remand might give consideration to Section 14B(3) of the Uniform Guidelines, 43 Fed. Reg. 38301 (1978), which concerns the use of training performance as a hiring criterion.

Second, there is no need to "eliminate confusion in the federal courts" on this question or to resolve any conflict among the circuits. The "confusion" is apparent only in the district court's application of *Washington* v. *Davis*, and no conflict on the question exists among the courts of appeals.

This Court has repeatedly held that a test or other selection device which has a disparate impact on the employment of minorities or women cannot be used unless it has been demonstrated that the test is "related to job performance" or bears a "manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431, 432; accord, *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425; *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 329. In approving the concept of training program validation in *Davis*,[7] this Court reaffirmed its holdings in *Griggs* and *Albemarle Paper* (426 U.S. at 250-251).

In *Davis*, this Court sustained the district court's conclusion that the test was "directly related to the requirements of the police training program" (426 U.S. at 250), reversing the court of appeals' determination that the relationship between the test and training school success did not satisfy "the crucial requirement of a direct relationship between performance on [the test] and performance on the policeman's job" (*id.* at 249-250). The district court in the instant case read *Davis* as holding that "a written test may be validated against training school performance alone even in the absence of evidence

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[7] The bulk of the Court's opinion dealt with a constitutional challenge to the use of the test; no violation of Title VII was alleged by plaintiffs (426 U.S. at 237 n.6). However, the Court applied standards "similar to those obtaining under Title VII" (*id.* at 249) in evaluating the test in question under 5 U.S.C. 3304.

that performance in the training program is related to the actual performance of the work" (Pet. App. B43).

This interpretation of *Davis* is faulty: the Court in *Davis* did not hold that validation against training school performance is sufficient even in the absence of evidence that that *training performance* is related to job performance; rather it held that such validation is sufficient even in the absence of evidence that the *test* is related to job performance. The Court did not reach the first question because plaintiffs did not place the relationship between the training program and the job in issue.[8] Rather, they took the position that the test must be related *directly* to job performance, rather than related *indirectly* through training school performance, regardless of the relationship between the training program and the job. It was this position that the Court rejected in *Davis*.[9]

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[8] This relationship may even have been conceded (see 426 U.S. at 250). In any event the relationship was not disputed before this Court.

[9] Mr. Justice White, who delivered the Court's opinion in *Davis*, confirmed in his dissenting opinion in *National Education Ass'n* v. *South Carolina*, 434 U.S. 1026, 1027 (1978), aff'g mem. *United States* v. *State of South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977) (three-judge court), that *Davis*

> did not hold that a training course, the completion of which is required for employment, need not itself be validated in terms of job relatedness. Nor did it hold that a test that a job applicant must pass and that is designed to indicate his mastery of the materials or skills taught in the training course can be validated without reference to the job.

The three-judge court in *South Carolina* found that the content of the National Teacher Examination (NTE) had

In suggesting that various lower court decisions are "in apparent conflict" (Pet. 13) as to the proper interpretation of *Davis*, petitioners properly cite certain cases (*id.* at 13-14) as supporting the United States' interpretation of *Davis;* for those cases do in fact hold that when a test is validated against a training program, it must also be demonstrated that the training program itself is job-related.[10] But none of the cases cited by petitioners (Pet. 14) as supporting their own interpretation of *Davis* holds that training program validation is sufficient for Title VII purposes without reference to the job-relatedness of the training program.[11] There is thus no conflict among the circuits on this question.

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been adequately validated against the content of teacher training programs in the state, as permitted by *Davis* (445 F. Supp. at 1112, 1113). However, the court also found a substantial relationship between the teacher training programs and the job of teaching (*id.* at 1108, 1116). This Court's summary affirmance of *South Carolina* is thus entirely consistent with our interpretation of *Davis*.

[10] Other cases supporting our construction of *Washington* v. *Davis*, in addition to those cited by petitioners, are *Craig* v. *County of Los Angeles*, 626 F.2d 659, 662-663 (9th Cir. 1980); and *Guardians Ass'n of the New York City Police Dep't, Inc.* v. *Civil Service Comm'n of the City of New York*, 23 Empl. Prac. Dec. ¶ 31,153, at 16,939-16,941 (2d Cir. July 25, 1980).

[11] *Richardson* v. *McFadden*, 540 F.2d 744 (4th Cir. 1976), was not a Title VII case, but rather a Fourteenth Amendment case. *Image of Greater San Antonio, Texas* v. *Brown*, 570 F.2d 517 (5th Cir. 1978), and *United States* v. *City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978), were both Title VII cases, but neither involved an attempt to validate a test against a training program. *United States* v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977), was a Title VII case involving training program validation, but the court did not reach the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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question at issue here because defendants failed to establish that the test adequately correlated with success in the training program. For a discussion of *United States* v. *State of South Carolina, supra,* see note 9, *supra.*

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